IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1972

No. 72-481

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,

v.

THE PUYALLUP TRIBE, INC., et al.,

No. 72-746

THE PUYALLUP TRIBE, INC., et al.

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON.

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF FOR THE WASHINGTON DEPARTMENT OF GAME, APPELLANT

SLADE GORTON,
Attorney General

JOSEPH L. CONIFF, JR.,
Assistant Attorney General
600 No. Capitol Way
Olympia, Washington 98504
Counsel for Washington Department of Game

Joseph L. Coniff, Jr., Counsel of Record
600 No. Capitol Way, Olympia, Washington 98504
May 3, 1973

SUBJECT INDEX

TABLE OF AUTHORITIES

Table of Cases

Statutes

Other Authorities

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1972

No. 72-481

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,

v.

THE PUYALLUP TRIBE, INC., et al.,

No. 72-746

THE PUYALLUP TRIBE, INC., et al.

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON.

ON WRITS OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF WASHINGTON

BRIEF FOR THE WASHINGTON DEPARTMENT OF GAME, APPELLANT

OPINIONS BELOW

The Washington Supreme Court rendered its opinion on the remand proceeding entitled *Department of Game of Washington v. Puyallup Tribe*, 80 Wn.2d 561, 497 P.2d 171 on May 4, 1972. Petitions for rehearing were timely filed and denied. The remittitur by the Washington Supreme Court is printed at page 30 of the remand appendix, hereinafter designated as Re. A. This Court granted and consolidated the writs of certiorari filed on behalf of the Washington Department of Game and the Federal Government on March 19, 1973.

JURISDICTION

The opinion of the Washington Supreme Court became its final judgment on June 23, 1972. The petition for writ of certiorari of the Washington Department of Game was filed on September 21, 1972, and was granted on March 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I. **Whether the Equal Protection concepts implicit in the Treaty phrase " . . . in common with all citizens of the Territory . . ." means that treaty Indians must abide by state conservation laws and regulations when they engage in fishing activities in off-reservation waters?**

II. **Whether the legislature of the State of Washington has the constitutional authority to classify steelhead trout as a game fish and thus preclude any commercial taking or dealing in that species by treaty Indians in off-reservation waters?**

THE TREATY AND STATUTES INVOLVED

The Treaty involved is known as the *Treaty of Medicine Creek*, 10 Stat. 1132.

Article III provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, . . .

The statutes involved are those of the State of Washington concerning fishery resource conserva-

tion by regulation of the time, place, and manner of fishing. Anadromous fish are the subject matter of this litigation. The management responsibilities for anadromous fish has been legislatively defined to include all species of salmon as food fish and steelhead trout as game fish.[1] Revised Code of Washington 77.16.060 provides:

> It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tip-up, snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any of the waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: *Provided*, That persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of nongame fish.
>
> Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

---

[1]The Department of Game has management responsibilities for steelhead trout and the Department of Fisheries for salmon. Revised Code of Washington Title 75 and Revised Code of Washington Title 77. Steelhead trout may only be taken by hook and line under regulations promulgated by the Department of Game.

Revised Code of Washington 75.12.280 provides:

> It shall be unlawful for any person to install, use, operate, or maintain within any waters of the state any monofilament gill net webbing of any description for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means or with such gear.

Volume 5, Washington Administrative Code, Section 232-12-340 provides:

> It shall be unlawful for any person to snag, spear, trap, shoot, or attempt to snag, spear, trap or shoot any game fish. No person shall fish for game fish in any other manner than with one line or rod held in the hand, and that such line or rod shall be under his immediate and absolute control. For the purpose of this regulation a hook means one single, double or treble fish hook. Any fishing line may have attached thereto any number of flashers or blades, but no more than two hooks, flies or artificial lures, or a combination of same. Artificial lures may have attached thereto any number of hooks: PROVIDED, That fresh water ling cod may be taken from Lake Palmer in Okanogan County, Lake Kachess, Keechelus and Cle Elum in Kittitas County with no more than one set line having attached thereto any number of hooks. Any set line must have attached an indestructible tag with the true name and address of the owner in legible English.

STATEMENT OF THE CASE

(1) Resume of Prior Pleadings

The complaint initiating these proceedings was

originally filed on November 12, 1963. (Rs. A. 5)[2] On January 12, 1967, the Washington Supreme Court rendered its first opinion. *Puyallup Tribe v. Department of Game*, 70 Wn.2d 245, 422 P.2d 754 (1967). (Rs. A. 39) On May 27, 1968, this Court rendered its original opinion entitled *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392. On August 7, 1969, a supplemental petition was filed in the trial court initiating the remand proceeding. (Re. A. 6) The remand trial occurred from September 21, 1970, through September 25, 1970. On December 30, 1970, the trial court entered its Findings of Fact and Conclusions of Law and Decree. (Re. A. 21). On May 4, 1972, the Washington Supreme Court rendered its opinion entitled *Department of Game of Washington v. Puyallup Tribe*, 80 Wn.2d 561, 497 P.2d 171. This Court granted and consolidated writs of certiorari filed on behalf of the Washington Department of Game and the Federal Government on March 19, 1973.

(2) Statement of Facts

The Washington Department of Game has an extensive statutory (Revised Code of Washington Title 77) and regulatory (Volume 5, Washington Administrative Code, Section 232) system for management of the game fish resource for public recreational enjoyment. In order to maximize the public recreational enjoyment of this valuable natural resource, the Washington Department of Game has

[2]The original record in *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968) is designated as Rs. The remand record is designated Re.

assumed the responsibility for enhancement of steelhead resources in waters of the state. To this end, the Department has expended large sums of public monies;[3] (1) for construction and operation of artificial steelhead rearing facilities and associated stream planting programs, (2) for construction of fish passage facilities over or around obstacles in the various rivers, (3) to establish a research team of qualified fish biologists to study and make recommendations concerning problems of conservation, perpetuation and enhancement of the steelhead trout resource. (Re. A. 33). Within the State of Washington, commercial fishing or commercial dealings in steelhead trout is prohibited. (Re. A. 51). These laws and regulations completely prohibit any commercial net fisheries for steelhead trout in any waters of the state.[4]

A basic description of the life cycle of anadromous fish and fishing regulations is contained in *Puyallup Tribe v. Department of Game*, 391 U.S. 392 at 395-396.

Over 50 percent of all steelhead trout presently caught in the sport fisheries in the State of Washing-

---

[3]The Washington Department of Game does not operate out of the general fund of the State of Washington. It is a dedicated fund agency and operates on revenues derived from sport fishing and hunting license sales plus certain monies made available through federal legislation. See: Revised Code of Washington Title 77.12.190, the Dingel-Johnson Act, 16 U.S.C. 777-777(k) (1950), and the Anadromous Fish Act, 16 U.S.C. 757.

[4]By virtue of the *Columbia River Compact*, 40 Stat. 515, both Washington and Oregon exercise concurrent jurisdiction over fishing activities in the Columbia River. Under Oregon law, steelhead trout are commercial fish until they enter tributary streams of the Columbia River in Oregon. Therefore, there is presently existing a commercial fishery for steelhead on the Columbia, but those steelhead may only be lawfully landed in the State of Oregon.

ton are the result of the Washington Department of Game's artificial propagation and planting programs. (Re. A. 36)

The value of a steelhead on the commercial market in Oregon is approximately 38c per pound. (Re. A. 40-41) Its value as a sport caught fish, in terms of its contribution to the economy of the State of Washington, is approximately $60. (Re. A. 41) A direct comparison between the value of a sport versus a commercially taken steelhead does not, of course, take into account the recreational or aesthetic values associated with the sport angling activity itself. (Re. A. 54)

Off-reservation waters provide the only locations where sport fishermen may reasonably expect to catch a steelhead trout with hook and line. The success of a hook and line fishery for steelhead in salt waters is minimal. (Re. A. 64) A direct interference with the ability of the sport angler to attempt to fish for steelhead trout in off-reservation fresh water streams of the State of Washington would occur should treaty Indians be permitted to place their nets in these same locations. (Re. A. 64)

Populations of steelhead trout constitute approximately five percent of the total anadromous fish resource of the State of Washington. Their limited numbers do not lend themselves to commercial exploitation. (Re. A. 55)

SUMMARY OF ARGUMENT

I. Whether the Equal Protection concepts implicit in the Treaty phrase " . . . in common with all citizens of the Territory . . ." means that treaty Indians must abide by state conservation laws and regulations when they engage in fishing activities in off-reservation waters?

This Court observed in *Puyallup Tribe v. Department of Game, supra,* at pp. 402-403:

> When the case was argued here, much was said about the *pros* and the *cons* of that issue. (conservation) Since the state court has given us no authoritative answer to the question, we leave it unanswered and only add that any ultimate findings on the conservation issue must also cover the issue of equal protection implicit in the phrase "in common with." *(Insert by author)*

This Court has consistently held that a state, under its police powers, may apply its law to all citizens regardless of ancestry and without discrimination, outside areas of federal or Indian jurisdiction. This proposition is predicated upon the rationale of the "Equal Footing Doctrine" and upon the Admission to Statehood Acts. *Ward v. Racehorse,* 163 U.S. 504 (1896); *Kake v. Egan,* 369 U.S. 60 (1962); *Mescalero Apache Tribe v. Franklin Jones, et al.,* 41 L.W. 4451, U.S. (March 27, 1973)

This Court has also consistently held that a state may apply its conservation laws to Indians when engaging in off-reservation fishing activities on the theory of protection of this valuable natural resource

which belongs to all the people. *Geer v. Connecticut*, 161 U.S. 519 (1896); *Tulee v. Washington*, 315 U.S. 681 (1942); *Puyallup Tribe v. Department of Game of Washington*, 391 U.S. 392 (1968).

This proposition is further supported by the fact that the "in common with all citizens" language in Article III of the *Treaty of Medicine Creek, supra*, appears in another context in the *Treaty with the Yakima*, 12 Stat. 951. Article III of the *Yakima Treaty* provides in relevant part:

> . . . as also the right, in common with citizens of the United States, to travel upon all public highways.

Any suggestion that the state has the burden of establishing that the application of its traffic laws to Indians engaging in off-reservation travel upon the public highways is reasonable and necessary for the public safety in each given instance is absurd. Yet such an interpretation of the *Yakima Treaty* provision, *supra*, must necessarily follow should this Court adopt the contentions of respondents.

II. Whether the legislature of the State of Washington has the constitutional authority to classify steelhead trout as a game fish and thus preclude any commercial taking or dealing in that species by treaty Indians in off-reservation waters?

Alternatively, the Washington Department of Game submits that there is a rational basis upon which the legislature of the State of Washington may classify steelhead trout as a game fish and thus pre-

clude commercial netting or dealing in that species. As this Court observed in *Puyallup Tribe v. Department of Game of Washington* at p. 398:

> The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the *manner* in which the fishing may be done and its purpose, *whether or not commercial*, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" *in the usual and accustomed" manner*. But the treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And *we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State.* (Emphasis supplied)

The state legislative classification of steelhead trout as a game fish is reasonable and meets the criteria of this Court as set forth above.

ARGUMENT

I. Whether the Equal Protection concepts implicit in the Treaty phrase " . . . in common with all citizens of the Territory . . ." means that treaty Indians must abide by state conservation laws and regulations when they engage in fishing in off-reservation waters?

Under the Constitution, it is the state and not the Federal Government which is the sovereign power which owns the fish as the representative of and for the benefit of all citizens. *Geer v Connecticut*, 161 U.S. 519 (1896). This common law principle was affirmed by the legislature of the State of Washington in RCW 77.12.010:

> The wild animals and wild birds in the state of Washington and game fish in the waters thereof are the property of the state.

Ward v. Racehorse, 163 U.S. 504 (1896) constitutes the leading decision articulating the concept of "Equal Footing" in relation to Indian treaties. The issue in this case was a treaty provision with the Bannock tribe which, the Indian tribe argued, granted them immunity from the application of the Wyoming hunting laws in off-reservation areas. This Court squarely rejected this argument stating:

> The argument, now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign State, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the

hunting districts, and the assertion of the power to continue the exercise of the privilege in question in the State of Wyoming in defiance of its laws. (163 U.S. at 510-511)

This Court went on to observe:

The act which admitted Wyoming into the Union, as we have said, expressly declared that the State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule. (163 U.S. at 511)

Ward v. Racehorse stands for the proposition that, upon admission into the Union, a state becomes endowed with powers and authorities equal in scope to those enjoyed by states already admitted and further articulates the concept that the Federal Government prior to statehood held its territories in trust for a future state. A newly admitted state becomes the successor in interest in those paramount sovereign and proprietary rights previously held by the Federal Government over its territories.

This Court concluded in *Ward v. Racehorse*:

Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public

faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States. (163 U.S. at 516)

The *Racehorse* doctrine was followed by this Court in *Kake v. Egan*, 369 U.S. 60 (1962).

In this case the Court was confronted with the problem of interpreting section four of the Alaska Statehood Act as it pertained to claimed fishing rights possessed by Indians of Alaska. The Federal Government contended that the reservation of absolute jurisdiction in the Alaska Enabling Act over Indian "property" ousted the state of any authority to regulate fishing by Indians in Alaska.

Analysis of the disclaimer clause of the Alaska Statehood Act led the Court to consider the legal evolution of the term "absolute jurisdiction" as it pertained to property rights as distinguished from governmental rights. The Court observed that the influence of state law upon Indians has increased rather than decreased since the days of Chief Justice Marshall, e.g., *Johnson v. McIntosh*, 8 Wheat. 543, 21 U.S. 230 (1823) and *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 350 (1832). By way of comparing the quantum of state power over on-reservation Indian activities with state power over off-reservation Indian activities, this Court stated:

These decisions indicate that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. Congress has gone even further with respect to Alaska reservations, 72 Stat. 545, 18 U.S.C. § 1162, 28 U.S.C. § 1360. State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation. It has never been doubted that States may punish crimes committed by Indians, even reservation Indians, outside of Indian country. See Cohen, Indian Rights and the Federal Courts, 24 Minn. L. Rev. 145, 153 (1940), citing Pablo v. People, 23 Colo. 134, 46 P. 636. Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v. Racehorse*, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F.2d 760, 765 (C. A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.

True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never

held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter.

Congress has neither authorized the use of fish traps at Kake and Angoon nor empowered the Secretary of the Interior to do so. (369 U.S. at 75-76)

This Court has recently recognized the distinction between on and off reservation activities in relation to the application of state laws. In *Mescalero Apache Tribe v. Franklin Jones, et al.*, 41 L.W. 4451 (March 27, 1973), this Court held at 4452:

But tribal activities conducted outside the reservation present different considerations. "State authority over Indians is yet more extensive over activities . . . not on any reservation" *Organized Village of Kake, supra*, at 75. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State. See, *e.g.*, *Puyallup Tribe v. Department of Game*, 391. U.S. 392, 398 (1968); *Organized Village of Kake, supra*, at 75-76; *Tulee v. Washington*, 315 U.S. 681, 683; *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928); *Ward v. Race Horse*, 163 U.S. 504 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse, supra*, at 516, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake, supra.*

Footnote five of the opinion at page 4453 further illustrates this line of demarcation:

> The Tribe's treaty with the United States, 10 Stat. 979 (1852), which acknowledges that the Tribe is "exclusively under the laws, jurisdiction, and government of the United States . . .," does not alter the obvious effect of the state's admission legislation. See, *e.g.*, *Organized Village of Kake*, *supra*, 369 U.S., at 67-68, and cases cited therein.

Significantly the *Puyallup Tribe v. Department of Game* decision, *supra*, was cited in support of this proposition at 44 L.W. 4454:

> The Court's decision in *Organized Village of Kake*, *supra*, which involved tribes organized under the Reorganization Act, demonstrates that off-reservation activities are within the reach of state law. See also *Puyallup Tribe*, *supra*, 391 U.S. at 398. What was said in *Shaw v. Gibson-Zahniser Oil Corp.* 276 U.S. 575 (1928), is relevant here.

The notion that Indians should be entitled to special treatment under state law when engaging in off-reservation fishing activities is predicated upon a strained interpretation of the "in common with" language of the Governor Stevens' treaties.[4] The "in common with" language refers to another subject in Article III of the *Treaty with the Yakima*, *supra*, which reads:

---

[4]Five treaties were executed by Territorial Governor Isaac I. Stevens with various Indian tribes resident in the State of Washington: *Treaty of Medicine Creek*, *supra*; *Treaty with the Quinaielt*, 12 Stat. 971; *Treaty of Point Elliott*, 12 Stat. 927; *Treaty of Point-No-Point*, 12 Stat. 933; and *Treaty with the Yakima*, *Supra*.

> . . . as also the right, in common with citizens of the United States, to travel upon all public highways.

It is submitted that this "in common with" treaty language cannot logically be interpreted to mean that Indians are entitled to special treatment with regard to the application of state or municipal traffic laws or regulations. The same result should be reached in interpreting the "in common with" language regarding the subject of fishing activities in off-reservation waters.

II. Whether the legislature of the State of Washington has the constitutional authority to classify steelhead trout as a game fish and thus preclude any commercial taking or dealing in that species by treaty Indians in off-reservation waters?

The legislature of the State of Washington has classified steelhead trout as a game fish. RCW 77.08.020*. Respondents, however, contend that such a classification is beyond the reach of state police power activity and they seek a judicial interpretation of the treaty clause in question to authorize them to commercially exploit the steelhead resource. It is the position of the Washington Department of Game that such an assertion is not well founded.

This Court, in *Puyallup Tribe v. Department of Game, supra*, expressly disposed of this contention with the following language:

> But the manner of fishing, the size of the take,

*The classification of steelhead as a game fish has been the law since 1925, Session Laws of Washington, 1925 Extraordinary Session, Chapter 178, Section 4.

the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians. (391 U.S. at 398)

Cases of similar import include *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916); *Tulee v. Washington*, 315 U.S. 681 (1942); and *Mescalero Apache, supra.*

The steelhead trout is highly prized by sportsmen because of its unique fighting characteristics. This was recognized by the legislature when it designated the steelhead trout the official fish of the State of Washington. RCW 1.20.045. As previously noted, the limited populations of steelhead do not lend themselves to commercial exploitations. (Re. A. 55) In light of such facts, the legislature acted on a rational basis by classifying steelhead as a game fish.

CONCLUSION

For the foregoing reasons and authorities, the Washington Department of Game, appellant, submits that the decision of the lower court should be reversed.

Respectfully submitted:

SLADE GORTON
Attorney General

JOSEPH L. CONIFF, JR.
Assistant Attorney General
Counsel for Appellant
Washington Department of Game